UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

CAESARS ENTERTAINMENT CORP. D/B/A RIO ALL-SUITES HOTEL AND CASINO Respondent, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 19 AFL-CIO Charging Party.	)	Case No. 28-CA-060841

MOTION FOR RECONSIDERATION
OR REOPENING THE RECORD AND REHEARING

Respondent Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino ("Rio" or the "Company") requests that the National Labor Relations Board ("Board" or "NLRB") reconsider its original order in this case following the Board's intervening decision in *The Boeing Company,* slip op. (NLRB Dec. 14, 2017) that not only overruled a portion of the Board's original order in this case, but also abandoned the legal standard under which the entire case was decided and retroactively adopted a new standard. Based on this new legal standard and the decision to overrule a portion of the original order, and pursuant to the NLRB Rules and Regulations § 102.48(d)(1), the Board's original order is inappropriate.

I. BACKGROUND AND PROCEDURAL HISTORY

Rio is one of several gaming and hospitality properties in Las Vegas, Nevada that are owned and operated by Caesars Entertainment Corporation. The Rio property employs more than 3,000 employees. All 3,000 employees receive and acknowledge the same employee handbook. The handbook governs the terms and conditions of employment, in some part, for Rio's total workforce.

The International Union of Painters and Allied Trades, District Council 15, Local 19 AFL-CIO ("Local 19") does not represent Rio employees, but nonetheless challenged ten rules in the handbook by filing a variety of unfair labor practice charges.

The Board subsequently filed a complaint asserting much the same charges. In its complaint, the Board alleged that Rio violated section 8(a)(1) of the Act by restricting, among other things, audiovisual recording in the workplace, disclosure of certain confidential information to the public, walking off the job during shifts, and using the Company's e-mail system and other computer resources for unapproved non-business purposes.

After holding a hearing, the ALJ sustained almost none of the Board's charges. In a partially divided decision, the Board reversed the ALJ's rulings on both the no-recording and confidentiality rules. As to the no-recording rules, the majority found that "photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid," and then concluded that reasonable employees would read the rules to restrict section 7 activity. The Board made much the same finding with respect to Rio's confidentiality rule, applying its decision in *Martin Luther Mem'l Home, Inc. d/b/a Lutheran Heritage Village-Livonia ("Lutheran Heritage"*), 343 NLRB 646 (2004), to find that the rule would be read by a reasonable employee as restricting section 7 activity. The portion of the case involving Rio's e-mail policy was remanded to an ALJ and has yet to be decided by the Board.

Nearly two years after the original order issued, the Board filed an application for enforcement in the United States Court of Appeals for the Ninth Circuit. Meanwhile, the Board decided *The Boeing Company*, a case involving a challenge to a similar no-recording rule. This time, the Board not only found that the no-recording rule was lawful, but also overruled its earlier finding in this case that "a similar rule was unlawful." *The Boeing Company*, slip op. at 5 n.12 (NLRB Dec. 14, 2017). According to the Board, the "majority in *Rio All-Suites Hotel* improperly limited [an earlier Board decision] *Flagstaff* to the facts of that case and failed to give appropriate

weight to the casino operator's interests in 'safeguarding guest privacy and the integrity of the Respondent's gaming operations.'" *Id.*, slip op. at 19 n.89. In overruling the Board's finding as to the no-recording rule in this case, the Board also adopted a new standard for evaluating all facially neutral handbook rules, replacing *Lutheran Heritage*. The new standard asks whether the rule, "when reasonably interpreted, would potentially interfere with Section 7 rights," and requires the Board to "evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement." *Id.*, slip op. at 14. This standard, the Board concluded, will apply "retroactively . . . to all pending cases." *Id.*, slip op. at 17.

II. THE BOARD SHOULD TAKE EXCLUSIVE JURISDICTION TO RECONSIDER THE CASE UNDER THE RETROACTIVELY APPLIED *BOEING* STANDARD

Motions for reconsideration should be granted where an intervening decision rendered the Board's original order inappropriate. *See R&H Masonry Supply, Inc.*, 258 NLRB 1220, 1221 (1981) (modifying original order to delete language no longer necessary following intervening adjudication). The Board has not considered any of the allegations in the original complaint under the retroactively applied *Boeing* test. *Cf. Kahn's & Co.*, 256 NLRB 930, 931 (1981) (reconsideration appropriate where substantial issue not previously considered by Board in issuing its original decision and order). Because the Board adopted the new test after issuing the original order in this case and decided to apply that test retroactively, the test's application was not even potentially at issue during the hearing or Board proceedings in this case. *See Detroit Newspaper Agency*, 361 NLRB 799, 800 (1999) (reconsideration appropriate where matter was not potentially at issue during trial). With the Board's intervening decision, it is only logical that the Board take exclusive jurisdiction and reconsider its original order because, most importantly, the Board decided to adopt *and* retroactively apply a new legal that governs every aspect of the case.

The Board's new standard applies to all handbook rules that potentially interfere with section 7 activity. *See Boeing*, slip op. at 19. The Board's original order applied the now-abandoned *Lutheran Heritage* standard in finding that three handbook rules constituted unlawful

interference with protected rights in violation of section 8(a)(1) of the Act. The Board's finding with respect to one such rule—Rio's restriction on recording—was expressly and categorically overruled. *See Boeing*, slip op. at 19 n.89. In addition, and by the Board's own terms, the remaining two rules must be reviewed under the new *Boeing* standard because the complaint in this case alleges that they interfere with section 7 rights and that new standard is not only meant to determine whether they do, but it also applies retroactively to the original order in this case that has not yet been enforced and is therefore still pending.

III. CONCLUSION

For these reasons, Rio requests that the Board take exclusive jurisdiction to reconsider its original decision in this case, allowing the parties to fully brief the issues under the retroactive new standard, or, alternatively, order that the record be reopened for further factfinding pursuant to the Board's intervening decision in *Boeing*. Given that the Board's enforcement application is subject to a briefing schedule with a deadline in ten days, Rio requests that the Board decide this motion expeditiously to avoid duplicative filings.

Respectfully submitted this 18th day of December, 2017.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned caused to be served on December 18, 2017, a copy of the MOTION FOR RECONSIDERATION OR REOPENING THE RECORD AND REHEARING via U.S. mail to the following:

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